UNITED NATIONS

GENERAL

ASSEMBLY

Distr.
GENERAL

A/CN.9/378/Add.3
28 May 1993

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-sixth session
Vienna, 5 - 23 July 1993

POSSIBLE FUTURE WORK

Note by the Secretariat

Addendum

Assignment of claims

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INTRODUCTION

1. During the Congress on International Trade Law held by the Commission during its twenty-fifth session in May 1992 in New York, it was suggested that work should be undertaken by the Commission on assignment of claims, an issue that the United Nations Sales Convention left unaddressed.

2. The present note addresses some of the legal issues in assignment of claims raising problems in international trade that are not addressed satisfactorily by existing rules, and considers the possible benefit of uniform rules that the Commission may wish to consider preparing.

I. ASSIGNMENT OF CLAIMS AS COMMERCIAL TRANSACTION

3. Assignment of claims is a transaction by which a party ("assignor" or "initial creditor") transfers to another party ("assignee") a claim for payment that the assignor has against a third party ("debtor"). Typical commercial purposes of assignments of claims are to sell a claim, pay a debt, or provide security for a debt.

4. In national as well as international trade, the assignment of claims finds extensive practical application as a means to give security for loans provided by financing institutions. Claims are assigned for security purposes either because the assignor does not have other suitable assets to offer as security or because the financing institution does not wish to take goods or other property as security. What distinguishes this type of security, as compared to a sale of a claim, is, for example, that, if the assignee collects payment from the debtor without the assignor having defaulted in the performance of the obligation for which the claim was given as security, the assignee may be liable to the assignor for breach of contract.

5. The assignment of claims often constitutes an element in "factoring" transactions, transactions in the context of which it is common that a supplier of goods or services assigns payment claims arising from its commercial activity to a financial institution ("factor"). The services of the factor may be to correspond with the debtors, collect the claims, keep certain records, possibly assume a part of non-payment risks, and to provide financing to the assignor of the claims. In a "forfaiting" transaction, which is in some respects similar to factoring, the assignor, in assigning the claim and receiving the amount of the claim reduced by the interest and the assignee's fee, obtains agreement from the assignee (financing institution) to waive the right to have recourse to the assignor if the claim is not paid.

II. LEGAL PROBLEMS IN ASSIGNMENT OF CLAIMS

6. One source of problems in the context of assignment of claims in international trade are divergences among national laws on the subject-matter. Another source of problems is the lack of modern rules on assignment adapted to deal with the needs of international trade. Furthermore, in some countries assignment of claims, or assignment as a security transaction, is not addressed at all in legislation.

7. National laws differ considerably on questions such as the requirements for the assignment to be valid. For example, some laws require a

writing, others require notification of the debtor or even registration of the assignment, while in yet other national laws no particular formality is required. Divergent answers are also given to questions of assignability of claims, for example, which claims are permitted to be assigned and which ones are not assignable, whether it is permitted to assign a future claim arising from a contract yet to be concluded, the validity of "bulk" assignments of all or part of present and future claims, the effect of an agreement between the creditor and the debtor that an existing or future claim should not be assigned (no- assignment clause), and whether it is possible to assign a part of a claim.

8. Differing requirements are provided in national laws for a valid assignment of claims to be effective towards the debtor. Those requirements are, for example, that the debtor obtained knowledge of the assignment, that the debtor was notified in a particular form about the assignment, that the debtor has consented to the assignment, or that the assignment has been registered in a particular public registry. Those differences are aggravated by the fact that many States recognize only assignments that have been made known to the debtor or registered in accordance with their national laws. As a result, an assignee seeking to enforce the assigned claim may be faced with a defence by the debtor that the assignment is not valid under the law of the State where the debtor has its place of business.

9. Particularly troublesome are different solutions in national laws as to the conflicts of priority between the assignee and another person asserting a right in the assigned claim. A priority conflict may arise between the assignee and an unpaid creditor of the assignor who has initiated an execution process regarding the assigned claim; in case of the assignor's bankruptcy, such a conflict may also arise between the assignee and the administrator of the assignor's assets who wishes the assigned claim to be included in those assets. Generally, the assignee is given priority if a certain act took place before the execution proceedings (or the opening of the bankruptcy proceedings), but national laws differ as to what that act should be. According to some national laws, the relevant act is the conclusion of the assignment agreement, in others it is the notification of the debtor and in yet others it is the registration of the assignment. It should be noted, however, that many national laws contain rules entitling the administrator of the bankrupt's assets to invalidate an assignment. The conclusion of the assignment within a specified period before the opening of the bankruptcy proceedings is a typical case in which, according to those rules, an assignment can be invalidated as a transaction contrary to the principle of equal treatment of creditors.

10. A priority conflict may also arise when the same claim has been assigned to more than one assignee. Such successive assignments may occur, for example, when a purchaser, pursuant to an agreement with its supplier who retain title to the goods until their price is paid, assigns to that supplier the claims to the proceeds from the sale of the goods, but later the purchaser assigns to a bank all its present and future claims against its clients in order to obtain working capital. Successive assignments may also be a result of a mistake or fraud. Some national laws give priority to the first assignee, others to the first assignee to notify the debtor, and yet others to the first assignee to register the assignment. It may be added that many national laws give priority to the supplier retaining title with regard to the proceeds from the resale of goods in case the supplier has lost the title to a good-faith buyer of the goods.

11. The above-mentioned problems and legal uncertainties may negatively affect the interests of all parties concerned. Sellers (assignors) face difficulties in mobilizing their claims in order to obtain working capital. The debtors' position is prejudiced in that uncertainties may arise as to their rights towards the assignees and the assignors. Assignees are often not in a position to know whether the assignments will be valid and enforceable in the country of the debtors. As a result, foreign creditors (assignees) may decide to withhold credit, which would otherwise be available, from sellers whose only or main asset is their claims against their clients.

III. PAST AND CURRENT WORK ON ASSIGNMENT AND RELATED TOPICS

A. National legislatures: special laws

12. The need for legal certainty and rules suited to trade has led some countries to modernize their legislation on assignment with the enactment of special laws dealing with assignment as a security transaction (for example, France has adopted such a law, known as Loi Dailly, in 1981, modified in 1984). In other countries, the revision of legislation on secured transactions, which includes assignment of claims, is being considered. 1/ In yet other countries, where the particular problems arising in the context of assignment as a security transaction are not addressed in sufficient detail by the existing general provisions on assignment, legal writers increasingly support a legislative intervention for the modernization of the law of assignment, or secured transactions in general.

B. The Commission: security interests

13. At its twelfth session (1979), the Commission had before it a report entitled "Security interests: feasibility of uniform rules to be used in the

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1/ A study group of the Permanent Editorial Board for the Uniform Commercial Code (UCC) of the United States of America has published in December 1992 a report calling for major changes in article 9 of the UCC, which deals with secured transactions. The report recommends to enlarge the scope of article 9 to cover property presently not covered, to improve the system for filing of security interests with appropriate offices, to facilitate the perfection of security interests in, inter alia, letters of credit, and to clarify the rights and duties of the secured creditor towards the debtor and other secured creditors. Work on the preparation of drafts of legislative modifications is expected to begin later in 1993. Similar legislative reviews are being undertaken in other countries.

financing of trade" (A/CN.9/165). 2/ The report noted that "although in principle there are no assets of a debtor which could not be used as collateral, certain kinds of moveables and moveables which are used in certain ways raise special problems" and that "it may be thought desirable to facilitate the use of claims not in the form of negotiable instruments as collateral, in which case special rules would be necessary" (paras. 47 and 51). As to the possible issues that may be addressed in uniform rules, the report suggested the form of security agreements, required and permissible provisions in the security agreement, rights of the secured party on default, types of movables which may be used as collateral, conflicts between the secured creditor and third parties, and the effect of foreign created security interests (paras. 41-59).

14. At the Commission's thirteenth session (1980), in the context of the discussion of the report "Security interests: issues to be considered in the preparation of uniform rules" (A/CN.9/186) 3/, which considered security interests in different kinds of movables, including claims, the conclusion reached was "that world-wide unification of the law of security interests in goods ... was in all likelihood unattainable". The Commission was led to that conclusion because it was concerned that the subject was too complex and the divergences among the different legal systems too many, as well as that it would require unification or harmonization of other areas of law, such as that of bankruptcy. During the discussion at that session, it was noted that it was advisable for the Commission to await the outcome of the work on the retention of title by the Council of Europe and on factoring by the International

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2/ Reproduced in United Nations Commission on International Trade Law Yearbook (hereafter referred to as "UNCITRAL Yearbook"), vol. X:1979, part two, II, C. Previous relevant reports on security interests are: report of the Commission on the work of its first session (1968), paras. 40-48 (UNCITRAL Yearbook, vol. I:1968-1970, part two, I, A); report of the Commission on the work of its third session (1970), paras. 139- 145, (UNCITRAL Yearbook, vol. I:1968-1970, part two, III A); doc. A/CN.9/102, "Security interests in goods", UNCITRAL Yearbook, vol. VI:1975, part two, II, 5); report of the Commission on the work of its eighth session (1975), paras. 47-63, (UNCITRAL Yearbook, vol. VI:1975, II, A); doc. A/CN.9/131 and annex, "Study on security interests" and "Legal principles governing security interests" (study prepared by Prof. Ulrich Drobnig of Germany) (UNCITRAL Yearbook, vol. VIII:1977, part two, II, A); doc. A/CN.9/132 "Article 9 of the Uniform Commercial Code of the United States of America", (UNCITRAL Yearbook, vol. VIII:1977, part two, II, B); report of the Commission on the work of its tenth session (1977), para. 37 (UNCITRAL Yearbook: vol. VIII:1977, part one II, A), and report of the Committee of the Whole II, paras.9-16, (UNCITRAL Yearbook, vol. VIII:1977, part one, II, A, Annex II).

3/ Reproduced in UNCITRAL Yearbook, vol. XI: 1980, part two, III, D.

Institute for the Unification of Private Law (UNIDROIT), prior to the Commission undertaking any further work of its own. 4/

C. UNIDROIT: Convention on International Factoring

15. Article 1.1 of the UNIDROIT Convention on International Factoring (Ottawa, 1988) specifies that the "Convention governs factoring contracts and assignments of receivables as described in this Chapter". According to article 1.2, "factoring contract", for the purposes of the Convention, means a contract by which a party ("the supplier") "may or will assign" to another party ("the factor") receivables arising from contracts of sale of goods made between the supplier and its customers ("debtors"), provided that a notice of the assignment is given to the debtor in writing and that at least two of the following four functions are to be performed by the factor: finance for the supplier, including loans and advance payments; maintenance of accounts (ledgering) relating to the receivables; collection of receivables; and protection against default in payment by debtors.

16. The Convention, which covers assignments of claims to the extent they take place in the context of factoring, deals to that extent with a number of assignment issues, such as notification of the debtor, validity of assignment of all present and future claims, invalidity of no-assignment clauses, and defences (including set-off) available to the debtor against the factor (assignee). Rules of the Convention on those issues would have to be taken into account, should the Commission decide to undertake work on assignments of claims. It may be noted that the Convention does not deal with the issue of priorities between the factor (assignee) and third parties, an issue that raises problems in practice, both in the context of factoring and in the context of assignment of claims in general. The Committee of Governmental Experts, which adopted the draft Convention, decided to exclude the issue of priorities between the factor (assignee) and third parties "on account of their extreme complexity ... notwithstanding the widely expressed regret that the Convention failed to regulate an aspect of the question which created very great difficulties at international level". 5/

D. Council of Europe/ICC: retention of title

17. The European Committee on Legal Cooperation (CDCJ) of the Council of Europe prepared in 1982 a draft Convention on retention of title. 6/ However, in view of the numerous reforms of the law on this subject, the Committee did not take a final position on that draft Convention, and in 1986 it decided to

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4/ Report of the United Nations Commission on International Trade Law on the work of its thirteenth session (1980), Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17, A/35/17, paras. 26-28, (UNCITRAL Yearbook, vol. XI:1980, part one, II, A)

5/ UNIDROIT 1987, Study LVIII - Doc. 33, para. 10.

6/ European Committee on Legal Cooperation (CDCJ) (82) 15.

adjourn its work indefinitely pending the outcome of those reforms. 7/ The International Chamber of Commerce (ICC) has prepared a guide providing basic information on retention of title in nineteen national laws. 8/

E. UNIDROIT: security interests in mobile equipment

18. In March 1992, UNIDROIT convened a restricted exploratory working group of experts to examine the feasibility of drawing up uniform rules on certain aspects of security interests in mobile equipment. This working group found that such a project would be feasible if it were confined to certain international aspects of security interests in mobile equipment of a kind normally moving from one State to another in the ordinary course of business (e.g., aircraft and containers). A Study Group, convened by the President of UNIDROIT for the preparation of uniform rules, held its first meeting in March 1993 and will meet again in 1994.

F. EBRD: draft Model Law on Secured Transactions

19. The European Bank on Reconstruction and Development (EBRD) is currently preparing a model law on secured transactions which could be used for establishing national laws in countries in Central and Eastern Europe and the former Soviet Union. It is intended that the model law would establish a contractual security interest that a debtor may grant to a creditor in various types of assets, including payment claims. The model law, which is intended to be finished by autumn 1993, will likely contain rules on registration of the security interest and on conflicts of priority between several creditors asserting a right in the collateral. The work by the EBRD would have to be taken into account, should the Commission decide to undertake work on assignment of claims.

IV. FUTURE WORK

20. It is submitted that the disparity of laws on assignment of claims and the lack of modern rules on the topic (above, paras. 6-11) give rise to difficulties that constitute an obstacle to international and national trade. While the assignment of claims is an important means to obtain financing for commercial transactions, the disparity and uncertainty of laws and the lack of modern rules make it difficult for sellers, buyers and financing institutions to take full advantage of its use. In particular, it is difficult for financing institutions to know whether they may accept claims against foreign debtors as security for trade credit, what rights the financing institution would have under such an assignment, and how the assignment should be concluded for it to be effective against third parties and enforceable against the foreign debtor.

7/ European Committee on Legal Co-operation (CDCJ) (83) 36, paras. 20 to 25.

8/ ICC Publication No. 467.

21. In order to overcome such difficulties, it is suggested that the Commission consider preparing uniform legislative rules on assignment of claims. In such work, the Commission could draw useful guidance from the extensive preparatory work in its earlier project on security interests (above, paras. 13-14), the UNIDROIT Convention on International Factoring (above, paras. 15-16), the work of the European Bank for Reconstruction and Development (above, para. 19), as well as from national projects to modernize the law of security interests.

22. Uniform rules on assignment of claims would enhance the creditworthiness of those suppliers of goods (assignors) whose only, or main, assets are payment claims arising from their supplies. Financing institutions (assignees) would benefit from such uniform rules in that, in providing financing to clients, they would have certainty that their security interests in claims are enforceable. Buyers of goods and services (debtors) would benefit in that their rights and obligations would be clearly defined and harmonized, and that their suppliers, to the extent they would be able to use payment claims to obtain financing, would be more willing to supply goods on credit.

23. If the Commission agrees with the suggestion, it may wish to request the Secretariat to prepare, in consultation with interested international organizations, for the twenty-seventh session of the Commission in 1994, a study on the possible scope of uniform rules and on possible issues to be dealt with in the rules. Such a study could consider whether the uniform rules should be restricted to assignments for security purposes or whether the uniform rules should deal also with assignments other than for security purposes.

24. A further issue for the study would be whether the uniform rules should cover only international assignments and how should an international assignment be defined. Another question would be whether it would be desirable to establish a regime that would, in its area of application, displace the national regimes, or whether a special regime should be created which the parties could opt for by agreement. The study would also consider possible issues to be covered by the uniform rules, such as the form in which an assignment should be concluded; assignability of claims; no-assignment clauses; warranties of the assignor; defences of the debtor against the assignee; effects of an assignment towards third parties; any option or requirement for registering an assignment; feasibility and features of an international registration system for assignments or other security transactions; effects of registration; and priorities among several persons asserting a right to the assigned claim.

25. An important question to be considered in the study would be whether the uniform rules should be restricted to assignments of claims, or whether it would be desirable to prepare more broadly conceived uniform rules on security interests in movable assets, including claims. This aspect of the study would depend on the consideration of questions such as: (a) is there equal practical need and desirability for the harmonization of law in both areas; (b) what might be the time needed to complete a more comprehensive project as opposed to a project limited to assignment of claims; (c) would it be desirable to leave a dichotomy between unified rules on security interests in claims and non-unified national rules on security interests in other kinds of movable assets; (d) would certain rules (e.g., on the registration of security interests in a public register) have the same purpose and be subject to the same legislative policy in the case of movable goods and in the case of

claims. As to the possibility of work on security interests in movable goods, including claims, it may be noted that at the Congress on International Trade Law, held by the Commission during its twenty-fifth session in May 1992 in New York, it was proposed that the Commission should revive its earlier project on security interests (above, paras. 13-14). In support of that proposal, it was suggested that the Commission's main reason for discontinuing work on this topic might not have been so much the complexity of the issues involved but rather the realization that, at that time, unification was not necessary on a worldwide scale.

26. In presenting alternatives as to the scope of possible uniform rules, the study would also present to the Commission proposals for coordination of work and cooperation with other international organizations, in particular UNIDROIT and the European Bank for Reconstruction and Development.

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